many states, a lien upon a railroad can be created only in a certain way, an order of the Railroad Commission being a part of the process. Suppose the President has approved the issue of a railroad bond, how does this make it a lien on the railroad, contrary to the law of the state where the railroad is situated? Assume, if you please, that Congress can create liens upon railroads — no great concession since federal courts constantly do so in creating receiver's certificates — the present statute has done nothing of the kind. The bond is valid, let us say, as a promise to pay, but is it secured by a lien?

Other delightful features of current state statutes, such as those declaring railroad certificates, notes, etc., not issued by the authority of the State Railroad Commission null and void, and punishing by fine or imprisonment those who issue them, need not be dwelt upon. In a statement of Mr. S. T. Bledsoe, General Counsel of the Atchison, Topeka and Santa Fe Railway Company, read before the Senate Committee on Interstate Commerce, January 20, 1919, will be found collected an extraordinary array of highly conflicting state laws about Railroad Bonds, limiting the power to borrow money as to amount, the rate of interest, the price of bonds, and the purpose for which the money may be used. In Texas, where the tribunes of the people have been very watchful, as a practical matter bonds cannot be issued until the railroad is built, but even this provision has not been completely successful in protecting the state against additional lines of railroad, a few having been financed on property in other states. Unless Congress is prepared to regulate the issue of railroad securities in a very much more thoroughgoing way than by the statute under consideration, they would better let it alone. Even the cleverest draftsman cannot frame a statute which will deal with this subject in an adequate way without the aid of lawyers expert from long experience in passing upon railroad securities. What a pity that the admirable qualities which enable a man to get an office are sometimes not the same as those which qualify him to administer it to the greatest public benefit! Until they are the same, there are cases where a legislator can consult an expert to advantage. This is one.

BLEWETT LEE.

JUDGMENT ON THE EVIDENCE NOTWITHSTANDING THE VERDICT. — If at the trial the defendant makes a motion for a compulsory nonsuit, or if either party moves for a directed verdict in his favor, and on the evidence or lack of evidence, the court should have granted the motion but did not, and a verdict is rendered against the party making the motion, the verdict should not and would not be allowed to stand. In England at common law on motion made to the court in *banc*, a new trial would be ordered. Until 1854 the decision of the court in *banc* was final; but by the Common Law Procedure Act [1] of that year an appeal was permitted, and the appellate court could order a new trial. In this country likewise a new trial may be ordered by the trial court (usually the single judge who presides at the trial), or by the appellate court.[2] It would

[1] § 35. A motion for a new trial is now made in the Court of Appeal. R. S. C., Order 39, Rule 1.

[2] See 31 HARV. L. REV. 682.

seem clear however that usually a new trial is not what is needed. If the state of the evidence was such as to justify taking the case from the jury in the first place, it would normally follow that it would justify the rendition of a judgment notwithstanding the verdict. In rendering such judgment the court is in effect doing after the trial what admittedly should have been done at the trial. Since there was no question on which it was the jury's province to find, its finding should be regarded as immaterial.[3] Accordingly in England by rule of court,[4] and in several states by statute,[5] and in a few by judicial decision,[6] the trial court on motion or the appellate court on appeal may order judgment notwithstanding the verdict when one of the parties moved at the trial for a nonsuit or directed verdict and the court wrongly denied the motion.[7]

But suppose that no attempt was made at the trial to take the case from the jury, but that it is subsequently discovered that the verdict was not supported by any evidence, and that if a motion had been made for a directed verdict it should have been granted. The House of Lords (Lord Finlay, L. C., and Lord Shaw, dissenting) has recently held in *Banbury* v. *Bank of Montreal*, [1918] A. C. 626, that the Court of Appeal need not grant a new trial but may in its discretion give judgment notwithstanding the verdict.[8]

Now it is well settled that the trial court (or in England the Court of Appeal) may in its discretion grant a new trial on a ground which might have been but was not urged at the trial.[9] In such a case it is not error for the court either to grant or to refuse to grant a new trial. It would seem that the same principle should apply to the ordering of judgment notwithstanding the verdict. If the plaintiff has had his day in court, if he has had a chance to present all his evidence, and if that evidence is insufficient as a matter of law to justify the verdict in his favor, there is no reason in the absence of special circumstances (such as accident, surprise, newly discovered evidence or the like[10]) why he should be entitled as a matter of right to another day in court. As Lord Atkinson

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[3] See 31 HARV. L. REV. 688–89.

[4] Order 58, Rule 4 provides: "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." In many English cases the court has exercised the power here given it. See Skeate *v.* Slaters, [1914] 2 K. B. 429; Winterbotham & Co. *v.* Sibthorp, [1918] 1 K. B. 625.

[5] MASS. L., 1909, c. 236; MINN. GEN. STAT., § 7998; PA. LAWS, 1905, No. 198.

[6] Hollingsworth *v.* Skelding, 142 N. C. 246, 55 S. E. 212 (1906); Anderson *v.* Phillips (N. D. 1918), 169 N. W. 315 (*semble*); Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109, 84 N. W. 14 (1900); Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800 (1903). And see Astley *v.* Garnett, 20 Brit. Col. R. 528 (1914).

[7] In Slocum *v.* N. Y. Life Insurance Co., 228 U. S. 364 (1913), it was held that these principles could not be followed in the federal courts because it violated the Seventh Amendment. For a criticism of this decision, see 26 HARV. L. REV. 732; 63 UNIV. OF PA. L. REV. 585; REP. AMER. BAR ASSOC., 1913, 561.

[8] The opposite result was reached (Robinson, J., dissenting) in Anderson *v.* Phillips 169 N. W. 315 (N. D. 1918).

[9] Farr *v.* Fuller, 8 Iowa, 347 (1859); Standard Oil Co. *v.* Amazon Insurance Co., 79 N. Y. 506 (1880). But see Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534 (1894).

[10] Alink *v.* Chicago, etc. Ry. Co. 169 N. W. 250 (Minn. 1918). All the judges in Banbury *v.* City of Montreal admit that if it is probable that more evidence would have been introduced by the plaintiff if a motion for a nonsuit had been made, then a new trial would be granted.

observed, "it seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found." [11]

RECOVERY FOR DEATH IN COLLISION AT SEA. — In 1808 Lord Ellenborough laid down the rule which has become so firmly fixed in the common law, that "in a civil court the death of a human being could not be complained of as an injury." [1] Although Lord Campbell's Act,[2] passed in 1846, and similar acts in most American jurisdictions, provide for recovery for death by wrongful act, the effect of Lord Ellenborough's decision is by no means destroyed. Situations not covered by these statutes, where consequently an injury goes remediless, are constantly arising. The principle of Lord Campbell's Act has never been adopted as part of the common law.[3]

The doctrine of the common law has been applied by courts of admiralty to actions for wrongfully causing death on the sea. Before 1886, a number of lower federal courts held that the common-law rule should not be applied in admiralty, and allowed recovery for death at sea.[4] These cases, however, were overruled, and the question was finally settled by the Supreme Court in *The Harrisburg* [5] on the ground that the maritime law, as received by maritime nations generally did not differ on such questions from the law as administered by the civil courts. Neither in England nor by the federal legislature in this country has a statute been passed in terms allowing for recovery for death at sea, so that any claim in admiralty must be based on Lord Campbell's Act and similar statutes in this country. The question whether these statutes give such a right was raised in a recently published case, *The Middlesex*,[6] in which it was held by the District Court for the District of Massachusetts that no recovery could be had against the owners of a Massachusetts ship by the personal representatives of three sailors on a Maine ship for their death in a collision with the former ship in which it was at fault.

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[11] Banbury *v.* Bank of Montreal, [1918] A. C. 626, page 675.

[1] Baker *v.* Bolton, 1 Campb. 493. No reason was given by Lord Ellenborough for the decision. An early case, Higgins *v.* Butcher, Yelverton, 89 (1606), had held that a husband could not recover for the death of his wife on a declaration which alleged damage to the wife.

[2] 9 & 10 VICT., c. 93. One of the earliest statutes of this type was enacted in Massachusetts in 1648. See TIFFANY, DEATH BY WRONGFUL ACT, § 4, note 5.

[3] See the dissent of Bramwell, B., in Osborn *v.* Gillett, L. R. 8 Ex. 88 (1873), in which he proclaimed the fallacy of the rule in Baker *v.* Bolton, *supra*.

There are some early American cases *contra* to Baker *v.* Bolton: Cross *v.* Guthery, 2 Root (Conn.) 90 (1794); Ford *v.* Monroe, 20 Wend. (N. Y.) 210 (1838); Sullivan *v.* Railroad Co., 3 Dill. (Circ. Ct.) 334 (1874). These cases were subsequently overruled.

[4] The Sea Gull, Chase, 145 (1867); The Towanda, 34 Leg. Int. 394 (1877); The Charles Morgan, 2 Flip. 274 (1878); The E. B. Ward, Jr., 17 Fed. 456 (1883), 23 Fed. 900 (1885); The Columbia, 27 Fed. 704 (1886).

For *dicta* to the same effect see cases cited in TIFFANY, DEATH BY WRONGFUL ACT, § 204, note 6.

For a review of these decisions, see The Harrisburg, *infra*, note 5.

[5] 119 U. S. 199 (1886). There are no English cases holding that the rule in admiralty differs from the rule at common law. See Seward *v.* The Vera Cruz, 10 A. C. 59, 66, 70 (1884).

[6] 253 Fed. 142 (1916).